

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY BARENGI GADJIN LAND COUNCIL ABORIGINAL CORPORATION

DATE OF DECISION: 7 February 2019

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has declined, in part, the application from Barengi Gadjin Land Council Aboriginal Corporation (**BGLC**) to be a registered as a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)* (**application**).

2. Decision Area

The application was made on 31 July 2007. It was divided into separate Zones and determined in stages with BGLC's consent. The present decision to decline BGLC's application relates to an area that includes the Grampians National Park/Gariwerd (**Gariwerd**), and the area east of Gariwerd to the Western Highway (**Decision Area**), as shown in the attached map (**Attachment 1**).

Formal claims by Traditional Owner corporations relevant to the Decision Area at the time the present decision was made included:

- the Eastern Maar Aboriginal Corporation (**EMAC**) RAP application
- the native title application by the Gariwerd Native Title Group (VID 533/2016) which comprises members of Traditional Owner groups represented by BGLC, EMAC and Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**)
- the native title application by Eastern Maar Peoples (**Eastern Maar**)
- Eastern Maar's application for a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010*.

3. Background to Decision

a) Native title

On 13 December 2005 the Wotjobaluk Federal Court Native Title Determination was made in relation to parcels of land within a broad area in the Wimmera-Mallee region of Victoria.

As part of the native title determination, BGLC was named the prescribed body corporate, within the meaning of s 253 of the *Native Title Act 1993 (Cth)* (**Native Title Act**), for the positive determination area.

The State of Victoria also entered into an Indigenous Land Use Agreement (**ILUA**), with BGLC and associated relevant bodies in 2005, as part of the broader settlement of the Wotjobaluk native title claim.

Details of the determination are recorded in the National Native Title Register pursuant to s 193 of the Native Title Act.

b) Previous decisions on the BGLC application

Council previously appointed BGLC as the RAP for areas within which BGLC is a registered native title holder, has an ILUA, and was recognised as having traditional ownership.

4. Findings of Fact and Evidence

In relation to the Decision Area, Council made the following findings of fact, based on the evidence and other material detailed.

a) Native Title (ss 151(2) 151(3)(a) and 151(3)(b) of the Act)

BGLC is not a native title holder or a native title party for the Decision Area.

No native title agreement in relation to the Decision Area had been brought to Council's attention. Council has considered BGLC's ILUA, however, the ILUA area does not include the Decision Area.

As part of the Wotjobaluk native title settlement, the freehold interest in three parcels of Crown land were transferred to BGLC. These areas are not in the Decision Area. Council is not aware of other land grants to Aboriginal bodies in the Decision Area.

As such, the land parcels that BGLC is a native title holder for are within its appointed RAP area, not in the Decision Area.

b) Recognition and Settlement Agreement (s 151(2A) of the Act)

BGLC is not a Traditional Owner Group Entity that has entered into a Recognition and Settlement Agreement pursuant to the *Traditional Owner Settlement Act 2010* (Vic) for the Decision Area. Accordingly, Council is not required by section 151(2A) of the Act to register BGLC as a RAP for the Decision Area.

c) Representation – Traditional Owners of Decision Area (s 151(3)(c) of the Act)

Council acknowledge that BGLC is a Prescribed Body Corporate under the Native Title Act holding native title rights and interests on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jugalk People.

BGLC's application was made on the basis that it represents Traditional Owners of the Decision Area. BGLC asserted that it represents the Traditional Owners of the Decision Area in its application and in correspondence, and provided material in support of this assertion.

Material included BGLC's Rule Book and membership criteria. BGLC's current Rule Book states that a member must be "*at least 18 years of age; and a) a native title holder; or b) an Aboriginal person who has been accepted as a Traditional Owner of Wotjobaluk Country according to the criteria and process set out in Schedule E*".

Schedule E states that, *“a Traditional Owner who is not a native title holder will be eligible for membership of the corporation if they can demonstrate descent from an apical ancestor who has been accepted by the native title group as an apical ancestor of Wotjobaluk Country”*, and defines a process for how the native title group make this finding. The Rule Book does not define Wotjobaluk Country, nor was this information provided to Council.

BGLC also provided a Cultural Heritage Report which draws on documents based on the nineteenth century Ebenezer Mission community’s accounts of BGLC's ancestors, as well as pastoral station papers, the writings of early ethnographers and the accounts of linguists. The Report uses various creation and cultural stories, as well as accounts of linguists and ethnographers, to illustrate the links between BGLC identified ancestors and the application area generally. The stories and accounts relate to areas in and around the Decision Area and are used in the Report to demonstrate the links between BGLC identified ancestors and the contemporary families represented by BGLC. Council considered all of this material.

Traditional ownership of the Decision Area is also claimed by other groups that claim to represent the Traditional Owners of the Decision Area; namely Martang and EMAC. Council considered the claims of these groups, and information they provided in relation to the BGLC application, as well as comments provided by BGLC in response.

Council noted correspondence from BGLC that demonstrated its intention and desire to negotiate boundaries and/or contact other Traditional Owner groups with a view to addressing overlapping interests in the Decision Area by agreement. While Council wrote to BGLC seeking updated information in relation to this matter, BGLC did not provide evidence that formal discussions with neighbouring groups had occurred in recent years.

At its meeting on 7 February 2019, Council found that traditional ownership of the Decision Area remained in dispute.

While Council acknowledged the information provided by BGLC to support its claim that it represents the Traditional Owners of the Decision Area, Council also had regard to the views of EMAC and Martang in relation to the BGLC application and concluded it was not satisfied BGLC is a body representing the Traditional Owners of that area.

While Council understands the complexities and challenges faced by Traditional Owner groups needing to address competing claims of traditional ownership, Council is unable to appoint either a single or joint RAP where such competing claims remain unresolved and where Traditional Owner groups have not reached agreement.

d) Representation – Historical or contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage (s 151(3)(d) of the Act)

Council found BGLC demonstrated experience in managing and protecting Aboriginal cultural heritage in the application area generally, including working with representatives of other Traditional Owner groups to pursue their Aboriginal cultural heritage management responsibilities. Council acknowledged BGLC has operated as a RAP since 2007 and established and operated a Cultural Heritage Program, a Site Monitoring Program and other

cultural management activities. However, BGLC did not present evidence about management and protection of Aboriginal cultural heritage in the Decision Area specifically.

e) Grant of fee simple (s 151(3)(e) of the Act)

BGLC had not drawn Council's attention to any grant of land in fee simple within the Decision Area, by the State or Commonwealth. Council also conducted reasonable searches and did not otherwise find that any such grant of land had been made.

f) Land and natural resource management (s 151(3)(f) of the Act)

BGLC had not entered into an agreement with the State in relation to land and natural resource management within the Decision Area.

g) Other considerations (s 151(3)(g) of the Act)

Council also took into account BGLC's significant experience and expertise in operating as a RAP since 2007.

5. Reasons for Decision

The following steps were taken into account in Council's decision-making process.

a) *Legislation*

In deciding BGLC's application over the Decision Area, Council took into account all of the matters it is required to consider under s 151 of the Act.

BGLC is not a registered native title holder for the Decisions Area within the meaning of section 151(2) of the Act, and has not entered into a recognition and settlement agreement in relation to the Decision Area within the meaning of section 151(2A) of the Act. As such, Council was not obliged to approve BGLC's application over the Decision Area under sections 151(2) or 151(2A) of the Act.

Council considered the matters set out in section 151(3) of the Act, and concluded BGLC had not established the factors set out in sections 151(3)(a), 151(3)(b), 151 (3)(e) and 151(3)(f). In considering the matters set out in section 151(3)(a), Council established that BGLC is not a native title party for the Decision Area. In considering the matters set out in section 151(3)(b), Council established that no terms of any native title agreement (as that term is defined in the Act) had been brought to Council's attention. In considering matters set out in section 151(3)(e), Council established there had been no relevant grants of land in fee simple to an Aboriginal body by the State or Commonwealth in relation to the Decision Area. In considering matters set out section 151(3)(f), Council established that there had been no relevant land and natural resource management agreements entered into by BGLC with the State.

Council considered, in accordance with sections 151(3)(c) and 151(3)(d), the question of whether BGLC is a body representing the Traditional Owners of the Decision Area, and/or a body representing Aboriginal people with a historical or contemporary interest in Aboriginal

cultural heritage relating to the Decision Area and expertise managing and protecting such heritage.

Council was not satisfied that BGLC alone was representative of the Traditional Owners of the Decision Area for the purpose of section 151(3)(c). In reaching this view, Council had regard to material put forward by BGLC, including: BGLC's membership and Rule Book; BGLC's responses to Council's request for information about the traditional or cultural connections of its members to the Decision Area and BGLC's representativeness; and the views of EMAC and Martang in relation to the BGLC application.

While Council recognises BGLC represents Aboriginal people with historical and contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage in the area generally, Council concluded these factors were not sufficiently established in the case of the Decision Area.

Council considered other matters under section 151(3)(g) and concluded that BGLC has strong organisational capacity to act as a RAP.

b) Policy

Council applied its policies as contained in its 'Fact Sheet for RAP applicants on registration of multiple RAPs for a single area' and 'General Principles - RAP Decision Making'.

Council's policy is to accord appropriate status to Traditional Owners including a preference to appoint Traditional Owner bodies corporate as RAPs. Council's policy is also to appoint RAPs that are single, inclusive groups and representative of Traditional Owners in the relevant application area.

c) Charter of Human Rights and Responsibilities

Prior to making the relevant decision, Council gave careful consideration to the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*, having particular regard to the distinct cultural rights of Aboriginal persons recognised in section 19(2)(d) of the Charter.

Council formed the view that the decision to decline to register BGLC over the Decision Area is compatible with the Charter.

Council took account of the fact that, in declining the application over the Decision Area, the people represented by BGLC will not be able to protect Aboriginal cultural heritage in the Decision Area as a RAP for that area. However, Council noted there are other mechanisms in the Act which ensure the protection of cultural heritage, and which enable relevant Aboriginal people to participate in the protection of cultural heritage in the Decision Area (including obligations on various entities to consult with relevant Aboriginal persons in relation to Aboriginal cultural heritage in the Decision Area). Further, Council considered that the decision to decline does not prevent BGLC from reapplying for registration as a RAP in future.

In any event, taking into account the factors set out in section 151(3), particularly the section 151(3)(c) factor, when read with the purposes of the Act (including one of the 'main

purposes' being 'to empower traditional owners as protectors of their cultural heritage...'), Council formed the view that any limitation to the rights of those Traditional Owners represented by BGLC is justified by the importance of Council ensuring that it is satisfied as to the Traditional Owners of the Decision Area when making RAP appointments. In this regard, Council did not identify any less restrictive means available to achieve this purpose, other than declining BLGC's application over the Decision Area.

Conclusion

Having taken all matters detailed above into account, Council declined BGLC's application to be registered as a RAP over the Decision Area.

While Council recognises there may be members of BGLC who are Traditional Owners of the Decision Area, and experienced in the management of cultural heritage in this area, Council formed the view that these factors were outweighed by the factors that did not support the BGLC RAP application; primarily, that BGLC did not demonstrate it alone was representative of the Traditional Owners of the Decision Area.

Council's decision does not preclude future applications over the Decision Area from BGLC. If BGLC were to consider preparing a future application over the Decision Area, Council would expect BGLC, before applying, to form an agreement about boundaries and cultural heritage management responsibilities with other groups claiming traditional ownership of the area.



Rodney Carter
Victorian Aboriginal Heritage Council

Attachment 1

